JD–17–11
Milwaukee, WI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SRC Painting, LLC; PBN, LLC; and Liquid Systems;
James Wierzbicki; Karen Wierzbicki;
Edmund Wierzbicki; Eric Wierzbicki;
Constance Wierzbicki; and
Erin Wierzbicki, individually[1]

and Cases 30-CA-16577
30-CA-16813

International Union of Painters
and Allied Trades,
District Council No. 7, AFL-CIO

Andrew S. Gollin, Esq,
for the General Counsel.
Christopher J. Ahrens, Esq., (Previant, Goldberg,
Uelmen, Gratz, Miller & Breuggeman, S.C.)
Milwaukee, Wisconsin
for the Charging Party.

DECISION

Statement of the Case

ARTHUR J. AMCHAN, Administrative Law Judge. This case was tried via videoconference in Milwaukee, Wisconsin and Washington, D.C. on March 4, 2011.[2] The General Counsel filed a post-hearing brief which was served on all parties.

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[1] The General Counsel makes claims only against Respondents SRC Painting, LLC; PBN, LLC; Liquid Systems; and Eric Wierzbicki, individually. Hereinafter reference to Respondents will only apply to these entities and to Eric Wierzbicki.

[2] Due to a number of factors particularly the failure of Respondent to respond to calls and emails from the administrative staff of the Judges Division and the limited nature of the issues in this case, I issued a order to show cause why this hearing should not be conducted by me from Washington, D.C. via video. The General Counsel and Charging Party did not object; Respondents did not reply to the Show Cause Order. Respondents did not appear at the Regional Office in Milwaukee on March 4, despite having received notice of the hearing. I conducted the hearing without Respondent's presence. The hearing lasted less than one hour.

Tr.42, line 14 should read, "Mr. Gollin," instead of "Mr. Ahrens."

On March 31, 2006, the Board issued its decision and order finding that Respondents violated the Act, 346 NLRB 707. Among other findings, the Board adopted the Administrative Law Judge's finding that Respondent discriminatorily discharged Brenten George and failed to recall him due to protected union activity in violation of Section 8(a)(3) and (1) of the Act.

On June 14, 2007, the United States Court of Appeals for the Seventh Circuit entered its judgment enforcing in full the provisions of the Board's order. The Court ordered Respondents to make all delinquent payments to the Union's health, welfare, vacation, apprenticeship, pension and other funds and to make Brenten George whole for any loss of earnings or other monetary relief suffered as a result of the discrimination against him. The Regional Director issued a compliance specification on June 30, 2010.

Respondent Eric Wierzbicki filed an Answer to the compliance specification on behalf of himself and Liquid Systems. In that Answer he made a number of assertions relevant to the amount of backpay due to Brenten George. However, since Respondents failed to appear at the instant hearing, the assertions in the Answer are just that—unproven assertions. Thus, they are not entitled to any probative weight.

On August 27, 2010, the General Counsel filed a Motion for Partial Summary Judgment on the grounds that Respondent's Answer was inadequate. On January 5, 2011, the Board issued a decision granting the General Counsel's Motion for Partial Summary Judgment for all allegations in the compliance specification except the amount of backpay due to Brenten George. It remanded this portion of the compliance specification to the Regional Director for the purpose of issuing a notice of hearing and scheduling a hearing before an administrative law judge for the purpose of taking evidence concerning mitigation and interim earnings.

On February 23, 2011, the Regional Director issued an amendment to the compliance specification.[3] The amendment decreased the backpay period from November 24, 2003-June 20, 2005 to November 24, 2003–March 3, 2005, on the grounds that George was no longer available for work after March 3, 2005. This reduced the net backpay due George from $32,734 to $26,222.49.

In compliance proceedings, the General Counsel bears the burden of proving the amount of gross backpay. He has discretion in selecting a formula closely approximating the amount due. The burden is on the Respondents to establish facts that reduce the gross backpay, *Minette Mills, Inc.,* 316 NLRB 1009, 1010-11 (1995). If a Respondent contends that the discriminatee failed to mitigate his or her damages by failing to make a reasonable effort to find work, it bears the burden of proof on this issue.

[3] The Answer to this amendment was not due until March 16, 2011, 12 days after the scheduled hearing. Respondent failed to file such an Answer. I conclude that Respondent was not prejudiced by the fact that the hearing was conducted prior to the date its Answer to the Amended Compliance Specification was due to be filed. This is so because the amendment reduced Respondent's backpay liability. Moreover, the evidence Respondent had the opportunity to present at hearing was identical for purposes of the amendment and the original compliance specification.

In this regard, the Respondent must show that there were substantially equivalent jobs within the relevant geographic area during the backpay period. Only if Respondent makes such a showing, must the General Counsel show that the discriminatee took reasonable steps to seek those jobs, *St. George Warehouse,* 351 NLRB 961 (2007).

Due to the fact that it did not appear at the hearing, Respondent did not establish that there were substantially equivalent jobs in the relevant geographic area during the backpay period. Thus, George is entitled to payment of the amount of backpay computed by the General Counsel.

Despite the fact that the General Counsel was not obligated to put on any evidence in light of Respondent's failure to appear the hearing, it elicited testimony from Region 30's compliance officer Richard Neuman, Brenten George and Donald Cardinali, a retired business agent of the Union.

Neuman testified as to the manner that he computed George's net backpay.[4] George provided him with a record of earnings during the backpay period. Neuman used these records to compute interim earnings which were deducted from George's gross backpay.[5] Neuman also testified that George's effort to find work through the Union's hiring hall was the normal way a union apprentice seeks work when he or she is unemployed. In seeking interim employment, a discriminatee need only follow his or her regular method for obtaining work, *Tualatin Electric,* 331 NLRB 36 (2000); *Ferguson Electric Co.,* 330 NLRB 514 (2000); *Big Three Industrial Gas,* 263 NLRB 1189, 1216-1217 (1982).

George testified that he reported to the Union's hiring hall, as he had been directed to do whenever he was out of work. George was recalled for work by Respondents for two weeks in January 2004. After he was laid off, George reported to Don Cardinali, a union business agent, who put him on an out-of-work list for two union contractors. George applied for work to both employers, but was not hired. George found part-time work in March or April 2004 with a non-union contractor for about 2-3 months. The Union then referred him to a union contractor, Maxima Painting. For a five month period in 2004, George worked for Maxima continuously. Maxima laid him off in November 2004 and George reported back to the union hall. He was not referred out again between November 2004 and March 2005, when he became unavailable for work. None of the Respondents contacted George regarding work opportunities during the backpay period.

In sum, the General Counsel met his burden in showing the amount of gross backpay due to Brenten George. Moreover, he has established the amount of George's net backpay. The Respondent did not establish any affirmative defenses to mitigate its liability. Thus Brenten George is entitled to the full amount of the net backpay calculated by the Region.

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[4] George's gross backpay was $40,976, from which Neuman deducted $14,753.51 in interim earnings to arrive at a net backpay figure of $26,222.49, G.C. Exh. 1(p), Amended Appendix I,

[5] Although it is customary to do so, the General Counsel is not required to provide the amount of interim earnings and the names of the interim employers since the burden is on the Respondent to prove that the appropriate backpay is less than the alleged gross backpay amount, *Flite Chief, Inc.,* 258 NLRB 1124, 1127 (1981).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

Respondents, SRC Painting, LLC; PBN, LLC; Liquid Systems and Eric Wierzbicki, individually, their officers, agents, successors and assigns, shall, consistent with the compliance specification as amended, satisfy their obligation to make Brenten George whole by paying him $26,222.49, together with interest thereon upon accrued to the date of payment computed in the manner described in *New Horizons for the Retarded,* 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.[7]

Dated, Washington, D.C. , March 24, 2011

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Arthur J. Amchan
Administrative Law Judge

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] The Board has declined to apply its new policy, announced in *Kentucky River Medical Center*, 356 NLRB No. 8 (October 22, 2010) of daily compounding of interest on backpay awards, in cases such as this, that were already in the compliance stage on the date that decision issued. *Three Rivers Electrical, Inc.*, 356 NLRB No. 38, slip op. at 1 fn. 2 (2010).